MATASSAN BIN HJ. SERUDIN & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Roberts C.J.) September 24, 1986]

[Bandar Seri Begawan – Criminal Appeal No. 10 of 1986]

Criminal Law and Procedure – Appeal against conviction and sentence – Carnal knowledge with a girl under 16 – Confession of one co-defendant against other co-defendants – Corroboration in sexual offences – Unlawful Carnal Knowledge Act (Cap. 29) – Evidence Act (Cap. 108) ss. 30 & 114(b).

Evidence – Confession of one co-defendant against other co-defendants – Corroboration in sexual offences – Evidence Act (Cap. 108) ss. 30 & 114(b).

The appellants were convicted and sentenced by the Magistrate on various charges of having carnal knowledge of a girl under sixteen. The prosecution relied mainly on her evidence.

The Magistrate relied on section 30 of the Evidence Act as entitling him to take into consideration a confession of one co-defendant against other co-defendants. The appellants contended otherwise and pointed out that evidence of an accomplice must be corroborated under section 114(b). On appeal,

Held: (1) the particular provisions of section 30 must have been intended to override the general provisions of section 114(b). There is no objection in the Magistrate giving weight to the statements of one co-defendant as against the others and of regarding them as amounting to corroboration of the evidence of the complainant against those defendants named in the confessions of their co-defendants;

(2) the Magistrate correctly directed himself that there are "grave dangers in accepting the evidence of the victim of sexual offences unless it is corroborated." Where he delivers such a warning to himself, it is still open to him to convict on the uncorroborated evidence of a complainant if he accepts her evidence as truthful and reliable;

(3) the appeals of D1 to D7 against conviction and sentence are dismissed, and those of D8 and D9 allowed.

CRIMINAL APPEALS.

Peter Lin for the defendants.

Dk. Zabaidah bte Pengiran Kamaludin (Deputy Public Prosecutor) for the State.

Cur. Adv. Vult.

Roberts C.J.: *Preliminary.* The nine appellants (D1 to D9) appeal against their conviction on various charges under the Unlawful Carnal Knowledge Act (Cap. 29).

D1 to D8 were convicted on the first charge, which alleged that they had all had carnal knowledge of a girl under sixteen (Miss N), between January 30 and February 1, 1986 at Hut 45, Kg. Junjongan.

D1 alone was convicted of a similar offence with the same girl, at about 6.30 p.m. on January 31, 1985, in a motorcar.

D3 and D4 were convicted of a similar offence with the same girl, on February 1, 1985, at Pantai Tutong.

D9 was convicted of a similar offence with the same girl, on the night of February 1, 1985, inside an unumbered hut at Pantai Tutong.

Prosecution case

(a) *Evidence of Miss N*

The prosecution relied mainly on Miss N, who gave evidence which, if believed, established that all the defendants (except D7, whom she could not identify and could only describe as another man) had sexual intercourse with her as alleged in the charges.

The magistrate found, as he was entitled to do, that Miss N was a truthful and reliable witness. He was satisfied that "the detailed descriptions which she gave of each of the men having sexual intercourse with her were consistent and truthful."

Mr. Lin, who argued the appeal with much skill, drew my attention to a number of supposed discrepancies in the evidence of Miss N, submitting that these were of such importance that the magistrate ought not to have accepted her as a truthful and reliable witness.

There are some discrepancies, but, in my view, these are of a minor nature, such as are to be expected from a witness trying to remember events involving several men, which occurred more than a year before trial, and subjected to a searching cross-examination.

I find no grounds in which I could properly disagree with the magistrate's finding of Miss N's credibility.

(b) *Medical*

Mr. Lin submitted that the magistrate had mistaken the effect of the medical evidence which did not establish, he argued, that Miss N had had

intercourse on January 31 or February 1, only that she had had intercourse on February 3.

Miss N herself admitted that she had intercourse with two other men (not the subject of any charge) on February 3. This was consistent with the evidence of two doctors that she had a laceration of the lower end of the vagina which was up to two days old.

The doctors also found that there was a tear of the hymen; one said it was more than a week old, the other, 8 to 10 days old. One of them thought there had been intercourse earlier than the occasion when the laceration of the vagina had occurred. One of the doctors thought that if the girl had been raped by ten men, there would have been bleeding. The other said that there would not be if the hymen was dilatory.

Neither doctor was asked to express an opinion as to whether the girl could have had intercourse with several men about five days before.

The medical evidence was, therefore, inconclusive. It could be said to be consistent with Miss N's story, to the extent that it does not contradict it. But neither did it give positive support to her evidence. I agree with the magistrate that "the medical evidence was not of great assistance either to the prosecution or to the defence."

(c) *Admissions of defendants.*

Apart from the testimony of Miss N, the other important evidence against some of the defendants consisted of their own written statements, containing admissions.

D2, D4, D5 and D6 all admitted, in cautioned statements which were admitted in evidence without objection by the defence, that they had had intercourse with Miss N, as alleged in the charges relating to them. D7 made an oral confession to Inspector Hatta, which was also admitted in evidence without challenge.

D1 and D3 were implicated in the statement made by D5. D1 was also implicated by D2 in his statement.

D1, D3, D8 and D9 made no admissions that they had had intercourse with Miss N.

Section 30 Evidence Act

The magistrate relied on section 30 of the Evidence Act as entitling him to take into consideration a confession of one co-defendant against other co-defendants.

The section reads:—

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession against such other person as well as the person who makes such confession."

It was argued that this provision did not permit the magistrate to give weight to the evidence of an accomplice, since such evidence must itself be corroborated under section 114(b).

In my view, the particular provisions of section 30 must have been intended to override the general provisions of section 114(b), since the evidence admitted under section 30 will be that of an accomplice jointly charged with the defendant who has made the confession.

This section differs from the English rules of evidence, which provide that the confession of an accused person is only evidence against himself and cannot be used against others.

The section has been applied with caution in India and those countries which have followed the Indian Evidence Act, on which our section is based.

It is established that no weight should be given to such evidence unless it is corroborated. Conversely, it may itself amount to corroboration of other evidence which is accepted as credible, but it is insufficient to justify a conviction by itself.

I, therefore, see no objection in the magistrate giving weight to the statements of one co-defendant as against the others and of regarding them as amounting to corroboration of the evidence of Miss N against those defendants named in the confessions of their co-defendants.

Corroboration

The magistrate correctly directed himself that there are "grave dangers in accepting the evidence of the victim of sexual offences unless it is corroborated."

Where a magistrate delivers such a warning to himself, it is still open to him to convict on the

uncorroborated evidence of a complainant, if he accepts her evidence as truthful and reliable.

It is, however, well established that, if he identifies as corroborative evidence which is not capable of amounting to corroboration, the conviction must be quashed.

In the passage, in which he reminds himself of the need for corroboration, the magistrate states "there is considerable corroboration of Miss N's evidence which I shall be referring to in due course." The implication is that such evidence is available in relation to all nine defendants.

However, I have been unable to find any evidence which supports that of Miss N in relation to D8 or D9.

D8 made no admissions himself. Nor is he implicated in any statement of a co-defendant. He gave evidence denying that he ever had sexual intercourse with Miss N. He was not cross-examined at all by the prosecutor.

D9 made a statement in which he admitted being with Miss N by himself, and with interfering with her, but denied intercourse. No co-defendant implicated him. In evidence, he agreed that he wanted to have intercourse with her but desisted when she refused him. His denial cannot be treated as corroboration.

I have, therefore, concluded that the magistrate misdirected himself as to the existence of corroboration of the evidence of Miss N against D8 and D9 and for this reason, I allowed the appeals of these two defendants.

This is the only fault which I could detect in this long and complicated trial, conducted with much skill and fairness by the magistrate.

The appeals of D1 to D7 against conviction and sentence are refused.

The appeals of D8 and D9 against conviction and sentence succeed and the convictions and sentences are quashed.

Sentence

So far as the sentences are concerned, these are, of course, severe.

However, the Act prescribes a minimum sentence of 2 years' imprisonment and a whipping. I do not, therefore, regard sentences of 2½ years and two strokes on each defendant for each offence as excessive.

The sentences of strokes will be cumulative, though the sentences of imprisonment are concurrent.

Delay

I regret having to refer to the long delay in the prosecution of these charges.

I had to comment in similar terms in Criminal Appeals 2, 3, 4, 5 of 1986 and in Criminal Appeal 6 of 1986.

In the former cases, there was an interval of 18 months between the defendants' first appearance in court and the taking of a plea. In the latter case, there was a gap of five months between first appearance and committal, after twelve appearances.

In this case, the defendants were charged, in court, on July 18, 1985. Trial was fixed for November 19, and adjourned to January 16, 1986 and then to February 1, 1986.

The trial then continued until July 5, although there were only 10 hearing dates. Judgment was delivered on August 4.

It is quite wrong that there should be a delay of over a year between plea and judgment.

I must again ask magistrates to show a sense of urgency and to be more resolute in refusing adjournments.

Waiting for trial subjects an accused to considerable strain, even if he is on bail, and all reasonable steps must be taken to reduce delays.

Order accordingly.

Solicitors: *K. Y. Lin & Co.*